No. 89-523

In The

Supreme Court of the United States

October Term, 1989

BERMUDA STAR LINE, INC.,

Petitioner,

versus

JOHN SPYRIDON MARKOZANNES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED

Does an interlocutory Order by a State Court denying a *forum non conveniens* dismissal of a maritime case constitute a final judgment or decree within the jurisdictional scope of 28 U.S.C. sec. 1257 for purposes of a review by this Court?

Is a State Court able to apply its own rule with respect to *forum non conveniens* in a Jones Act and a general maritime claim brought pursuant to the "savings to suitors" clause contained in 28 U.S.C. sec. 1233, as it could if it were hearing a claim under the Federal Employers' Liability Act?

TABLE OF CONTENTS

Page

Corrections to Statement of the Case 1

Summary of Argument 3

Argument 4

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES:

Exxon vs. Chick Kam Choo, ___ U.S. ___, 108 S.Ct. 1684 (1988) 10

Garrett vs. Moore-McCormack Company, 317 U.S. 239, 63 S.Ct. 246 (1942) 6, 8

Gulf Oil Corp. vs. Gilbert, 330 U.S. 501, 67 S.Ct. 839 (1947) 2

Hellenic Lines, Ltd. vs. Rhoditis, 398 U.S. 306, 90 S.Ct. 1731 (1970) 2, 5

In Re: Air Crash Disaster Near New Orleans, Louisiana, 821 F.2d 1147 (CA5, 1987) 9

Kassapas vs. Arkon Shipping Agency, Inc., 485 So.2d 565 (La. App. 5th Cir., 1986), writ denied 488 So.2d 203, U.S. cert. denied 107 S.Ct. 422 (1986) 6

Missouri ex rel. Southern Ry. Co. vs. Mayfield, 340 U.S. 1, 71 S.Ct. 1 (1950) 6, 7, 8, 9, 10

Norfolk and Western Railway Company vs. Beatty, 400 F.Supp. 234 (S.D. Ill. 1975), aff'd, 423 U.S. 1009, 96 S.Ct. 439 (1975) 7

Red Cross Line vs. Atlantic Fruit Company, 264 U.S. 109, 44 S.Ct. 274 (1924) 8

Sibaja vs. Dow Chemical Company, 757 F.2d 1215 (CA11, 1985), cert. denied 106 S.Ct. 347 (1985) 8

Van Dusen vs. Barrack, 376 U.S. 612, 84 S.Ct. 805 (1964) 8

Wilfried Van Cauwenberghe vs. Baird, 486 U.S. ___, 108 S.Ct. 1945 (1988) 4

TABLE OF AUTHORITIES – Continued

Page

Zipfel vs. Halliburton Co., 832 F.2d 1477 (CA9, 1987), cert. denied 108 S.Ct. 2819, as amended 861 F.2d 565 (1988) 9

STATUTES:

28 U.S.C. sec. 1257 ..... 3, 4

28 U.S.C. sec. 1404(a) 2

ARTICLES:

Bickel, *The Doctrine of Forum Non Conveniens as Applied in Federal Courts in Matters of Admiralty*, 35 Cornell L. Q. 12 (1949) 9

Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U. Pa. L.Rev. 781 (1985) 9

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May It Please The Court:

CORRECTIONS TO STATEMENT OF THE CASE

Undersigned counsel respectfully takes issue with material omissions from the Statement of the Case made by counsel for Petitioner. At the outset of litigation, Petitioner *stipulated* that it was amenable to jurisdiction *in personam* in Orleans Parish, Louisiana. Moreover, Petitioner *stipulated* that its "base of operations" is in Teaneck, New Jersey. Unlike the typical maritime case involving a seaman of foreign nationality, Respondent was hired directly by the New Jersey-based Petitioner, and his letter of engagement (i.e., employment contract)

contains no foreign litigation clause whatsoever. The Petitioner cruise line operates cruises to the Caribbean and Mexico from the Port of New Orleans during the winter cruising season, principally utilizing the cruise vessels S/S QUEEN OF BERMUDA and S/S BERMUDA STAR. On the "off" season, Petitioner's vessel S/S BERMUDA STAR operates a cruise service from the Northeast United States to Bermuda. Respondent sustained a personal injury on one such domestic cruise. Petitioner and its cruise ship S/S BERMUDA STAR in particular have been subjects of multiple personal injury cases in State and Federal Courts in New Orleans over the years. In this case, having stipulated to personal jurisdiction and a New Jersey base of operations, Petitioner would have been precluded from obtaining a *forum non conveniens* dismissal of this case in favor of a foreign forum even had the case been brought in Federal Court.[1] Petitioner's real objective was to effect a "change of venue" to New York near its base of operations by means of a *forum non conveniens* dismissal. While Petitioner's position was arguable, it presents a quite atypical factual and procedural scenario. In Federal Court, an argument that a case ought be dismissed on ground of *forum non conveniens* in preference to an alternative American forum has been procedurally inappropriate since 28 U.S.C. sec. 1404(a) was enacted following *Gulf Oil Corp. vs. Gilbert*, 330 U.S. 501, 67 S.Ct. 839 (1947).

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[1] *Hellenic Lines, Ltd. vs. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731 (1970).

SUMMARY OF ARGUMENT

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1257 despite the fact that a *denial* of a *forum non conveniens* dismissal in a maritime case is patently an interlocutory order by State or Federal criteria. 28 U.S.C. sec. 1257 authorizes a review by this Court of "[f]inal judgments or decrees" rendered by the Louisiana Supreme Court, and Respondent respectfully submits that the Louisiana Supreme Court's reinstatement of the Trial Court's interlocutory order dismissing Petitioner's *forum non conveniens* defense does not rise to the status of a final judgment or decree.

The principle of uniformity is no different in general maritime or Jones Act litigation than it is in Federal Employers' Liability Act litigation. In both instances, the general rule is that the substantive Federal law must be followed by the State Court hearing the matter under the Savings to Suitors Statute, but in matters of procedure the State Court is able to follow its own statutes and requirements. While it is often difficult to classify a particular issue as entirely substantive versus procedural, nevertheless this Court has previously definitively ruled that *forum non conveniens* is not a part of the Federal substantive FELA remedy, with the result that a State Court is free to apply its own rule with respect to that defense. The same rationale ought to be applied to the instant Jones Act and unseaworthiness case, and the Petition for Certiorari accordingly ought to be denied.

ARGUMENT

It would be most extraordinary for this Court to review an interlocutory order of a State Supreme Court reinstating a Trial Court's *denial* of a defense. Certainly under Federal procedural guidelines, a majority of the Federal Courts of Appeals have held that an order denying a motion to dismiss on the ground of *forum non conveniens* is not immediately appealable, and this Court has recently so held. *Wilfried Van Cauwenberghe vs. Baird*, 486 U.S. ___, 108 S.Ct. 1945 (1988). Similarly, Respondent doubts that the denial of a *forum non conveniens* defense rises to the status of a "final judgment or decree" contemplated by the review grant relied upon by Petitioner in 28 U.S.C. sec. 1257. With respect, Respondent suggests that this Court is without the cited statutory authority to review the interlocutory order issued by the Louisiana Supreme Court.

Although uniformity is the rallying cry of Petitioner, the effective result of Petitioner's *forum non conveniens* defense would have been the same had Petitioner been favored with a Federal forum in addressing the defense on the merits. The concept of jurisdiction in Louisiana and all State Courts is considerably more narrow than the constitutional grant in favor of courts of the United States in maritime cases. *A fortiori*, there is characteristically less frequent opportunity for the defense of *forum non conveniens* to be raised in State Court because the defense technically assumes valid jurisdiction and venue.

In the case at bar, Petitioner stipulated to valid *in personam* jurisdiction by the Louisiana State Court, and moreover stipulated to the fact that its base of operations

is in the State of New Jersey. Not only are Petitioner's cruise vessels frequent visitors to the Port of New Orleans, but the Port of New Orleans is additionally the departure and termination point for cruises during the high winter season. Significantly, Petitioner has been a frequent litigator in State and Federal Court in New Orleans over the years in personal injury cases. It is perhaps less than a statement of advocacy to suggest that most Federal and State Courts would have been inclined to dismiss Petitioner's *forum non conveniens* argument on the merits. *Hellenic Lines, Ltd. vs. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731 (1970).

Thus, with the foregoing factual scenario offering Petitioner a remote chance of prevailing on the *forum non conveniens* issue at best, Petitioner sought at the outset to characterize its *forum non conveniens* dispute in terms of a matter of monumental importance. Louisiana is patently *not* an "open forum" state and has recently enacted a statute giving its courts the heretofore unrecognized right to dismiss a case on *forum non conveniens* grounds. The statute in question explicitly excepts maritime cases from the scope of *forum non conveniens* dismissals. The Court will note that the Louisiana appellate disagreement between the Fourth Circuit Court of Appeal and the Louisiana Supreme Court in large measure dealt with interpretation of that recently enacted statute, with the Louisiana Supreme Court definitively stating that the *forum non conveniens* statute did not contemplate maritime cases.

However, this is not the first time that Louisiana procedural law in the area of *forum non conveniens* and maritime cases has come to the attention of this Court.

Petitioner fails to note for the Court that a United States Supreme Court Writ of Certiorari was sought, and denied, in *Kassapas vs. Arkon Shipping Agency, Inc.*, 485 So.2d 565 (La. App. 5th Cir., 1986), writ denied 488 So.2d 203, U.S. cert. denied 107 S.Ct. 422 (1986). In *Kassapas* the Louisiana Court of Appeal for the Fifth Circuit had noted, with concurrence by the Louisiana Supreme Court, that the non-statutory doctrine of *forum non conveniens* was unavailable to maritime litigants in cases brought pursuant to the Savings to Suitors Statute in Louisiana State Court. The underlying rationale of the decision was Louisiana's historic posture as a civilian jurisdiction free of non-statutory procedural remedies and this Court's decision in *Missouri ex rel. Southern Ry Co. vs. Mayfield*, 340 U.S. 1, 71 S.Ct. 1 (1950).

The principle of uniformity relied upon by Petitioner in argument is no different in Jones Act or maritime claims than it is in Federal Employers' Liability Act claims. This was made perfectly clear by this Court in *Garrett vs. Moore-McCormack Company*, 317 U.S. 239, 244, 63 S.Ct. 246, 250 (1942):

> "This Court has specifically held that the Jones Act is to have a uniform application throughout the country unaffected by 'local view of common law rules.' Panama R. Co. v. Johnson, 264 U.S. 375, 392, 44 S.Ct. 391, 396, 68 L.Ed. 748. The Act is based upon and incorporates by reference the Federal Employers' Liability Act, 45 U.S.C.A. sec. 51 et seq., which also requires uniform interpretation. Second Employers Liability Cases (Mondou vs. New York, New Haven & Hartford Railroad Co.), 223 U.S.1, 55 et seq., 32 S.Ct. 169, 177, 56 L.Ed. 327, 38, 38 L.R.A., N.S., 44."

In the case of *Missouri ex rel. Southern Railway Company vs. Mayfield*, 340 U.S. 1, 4, 5, 71 S.Ct. 1, 3 (1950). specifically relied upon by the Louisiana Supreme Court, this Court noted:

> " . . . Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of *forum non conveniens*, a question of State law not open to review here."
>
> * * *
>
> "Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law."

Petitioner mentions *Mayfield* only in passing, with a parenthetical statement suggesting that "issues of uniformity" are present in Jones Act cases that are not apparent in FELA cases. Petitioner's Writ, p. 17. Contrary to this unsupported proposition, the Court in *Norfolk and Western Railway Company vs. Beatty*, 400 F.Supp. 234, 237 (S.D. Ill. 1975), aff'd, 423 U.S. 1009, 96 S.Ct. 439 (1975) held that this Court's *Mayfield* pronouncement was equally applicable to Jones Act cases tried in State Court:

> "Since state rules on *forum non conveniens* govern in F.E.L.A. and Jones Act matters, by analogy state procedure should control here. *Missouri ex rel. Southern Railway vs. Mayfield*, 340 U.S. 1, 71 S.Ct. 1 (1950)."

Since there is no difference in the principle of uniformity between FELA cases tried in State Court on the one hand and Jones Act and general maritime law cases tried

in State Court on the other hand, *Garrett, supra,* and the holding by this Court in *Mayfield, supra,* concerning *forum non conveniens* should be equally applicable and dispositive in the instance case. The Court's attention is drawn to the United States Court of Appeals decision from the Eleventh Circuit in *Sibaja vs. Dow Chemical Company,* 757 F.2d 1215 (CA 11, 1985), cert. denied 106 S.Ct. 347 (1985), in which the Court held that a Federal Court in a diversity case is not obligated by the *Erie* doctrine to apply state *forum non conveniens* law, which the Court characterized as "a rule of venue, not a rule of decision" and a matter "completely apart from any application of . . . substantive law."

This Court has previously recognized that a state is free to adopt remedies and procedures in maritime cases in supplementation of Federal law, even where an admiralty court would not be able to accord a similar remedy. For example, in *Red Cross Line vs. Atlantic Fruit Company,* 264 U.S. 109, 44 S.Ct. 274 (1924). this Court noted that the right of a common-law remedy afforded suitors does not include all means which may be employed to enforce the right or redress the injury involved, and conversely that a state having concurrent jurisdiction is free to adopt such remedies and attach to them such incidents as it sees fit.

In the present case, the Louisiana Supreme Court has continued a history of judicial observations that non-statutory arguments of *forum non conveniens* are not recognized in the purely statutory framework of Louisiana's procedural law. Obviously, the defense of *forum non conveniens* is procedural only and not substantive. A change in courtrooms at least ideally ought not bring about a change of substantive law. *Van Dusen vs. Barrack,* 376 U.S.

612, 639, 84 S.Ct. 805, 821 (1964). Louisiana currently has a statutory procedural device for urging a *forum non conveniens* dismissal of a case. However, Louisiana's Supreme Court has interpreted that statute in this case not to include within its scope Jones Act or maritime cases. It is the prerogative of the State of Louisiana to make procedural distinctions of this nature. *Mayfield, supra.*

Petitioner argues the need for uniformity in the American maritime law, blurring the distinction between the procedural implications and differences in fora contemplated by the Savings to Suitors Statute and *substantive* maritime law. Petitioner assumes a uniformity in *forum non conveniens* procedural law in the Federal Courts and in states other than Louisiana in the maritime context. *Forum non conveniens* is a matter committed to the wide discretion of the Trial Court, and it is commonly conceded that there is absolutely no uniformity even in Federal practice in the area of *forum non conveniens* in maritime and other cases. See Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine,* 133 U.Pa.L.Rev. 781, 831-40 (1985); Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty,* 35 Cornell L. Q. 12 (1949). There is inconsistency in the Federal Circuits currently in cases of *forum non conveniens* involving seamen in such areas as whether or not clear applicability of the Jones Act precludes a *forum non conveniens* dismissal. *Compare, Zipfel vs. Halliburton Co.,* 832 F.2d 1477 (CA9, 1987), cert. denied 108 S.Ct. 2819, as amended 861 F.2d 565 (1988) *with In Re: Air Crash Disaster Near New Orleans, Louisiana,* 821 F.2d 1147, 1164, note 29 (CA5 1987).

Thus, it is doubtful whether in actual practice recognition by Louisiana State Courts of a *forum non conveniens* non-statutory defense would bring about any "uniformity" in application at all, and certainly Petitioner cannot point to a single body of principles which indisputably constitutes the procedural "law" on *forum non conveniens* at present. The case of *Exxon vs. Chick Kam Choo*, ___ U.S. ___, 108 S.Ct. 1684 (1988) does not mandate a reversal of the historical distinction between substantive and procedural law in *forum non conveniens* decisions made heretofore by this Court. Uniformity of decisions and protection of judgments issues addressed in *Exxon* more properly dealt with the finality of decisions on *forum non conveniens* made in the first instance by a Federal Court. These issues are obviously not present in the case at bar.

CONCLUSION

Louisiana's appreciation of the doctrine of *forum non conveniens* is a matter entirely procedural and not open to review in the context of this Case. *Mayfield, supra.* The goal of substantive uniformity necessary for FELA and Jones Act cases brought in State Court is and must be recognized in Louisiana. However, the same procedural freedom that a state has to apply its own understanding of *forum non conveniens* in an FELA case is open to Louisiana logically in a Jones Act case as well. This Court respectfully ought not recognize jurisdiction to review an interlocutory order of the Louisiana Supreme Court reinstating a Trial Court's *denial* of a *forum non conveniens*

defense. Moreover, on the merits certiorari should be denied.

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